Sup. Ct. U.S.

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No.

In the

Supreme Court of the United States

Joe John Rodriguez

Petitioner

vs.

Wayne W. Farrell, and Lois Szczepanski

On Petition for Writ of Certiorari
To the United States Court of Appeals for
the Eleventh Circuit

SUPPLEMENTAL APPENDIX OF PETITIONER

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION

CASE NO. 6:98-997-CIV-ORL-19A

JOE JOHN RODRIGUEZ,
Plaintiff,

v.

CITY OF WINTER PARK, FLORIDA,
a municipal corporation, WAYNE W. FARRELL,
and LOIS SZCZEPANSKI,
Defendants.

ORDER

This cause came before the Court on the following matters: 1) Defendant City of Winter Park's Motion for Summary Judgment and Incorporating Memorandum of Law (Doc. No. 50, filed March 9, 2000) and Combined Response of the Plaintiff to the Motions for Summary Judgment by all Defendants (Doc. No. 76, filed April 10, 2000).

2) Motion for Summary Judgment of Defendants, Wayne M. Farrell and Lois (Lorri) Szczepanski and Supporting Memorandum of Law (Doc. No. 43, filed March 8, 2000) and Combined Response of the Plaintiff to the Motions for Summary judgment by all Defendants (Doc. No. 76, filed April 10, 2000).

3) Plaintiff's Motion for Partial Summary Judgment Against the Defendant, City of Winter Park (Doc. No. 60, filed March 10,2000) and Defendant City of Winter Park's Opposition to Plaintiff's Motion for Partial Summary Judgment (Doc. No. 64, filed March 29, 2000).

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Introduction

Plaintiff Joe John Rodriguez brings this lawsuit based on 42 U.S.C. § 1983 against Defendants city of Winter Park, Florida, Sergeant Wayne W. Farrell, and Officer Lois Szczepanski (sergeant Farrell and Officer Szczepanski will be referred to as the "Individual Defendants" The Plaintiff asserts that all of the Defendants violated his constitutional rights by unlawfully arresting him in violation of 42 U.S.C. § 1983 ("unlawful arrest claim"). The Plaintiff asserts that the city of Winter Park is liable for the common law tort of false arrest "false arrest claim" The Plaintiff also asserts that the city of Winter Park and Sergeant Farrell are liable for using excessive force in violation of 42 U.S.C. § 1983. The Defendants have moved for summary judgment on all of the Plaintiff's claims The Plaintiff moves for partial summary judgment on his claims against Defendant City of Winter Park

Facts

When the record evidence is viewed in a light most favorable to the Plaintiff, the pertinent facts are as follows. The Plaintiff was traveling in a car driven by his friend Patricia Foulkes (Doc No. 45 at ¶ 4). The car was directed to stop by a police car driven by Officer Szczepanski See id. During the course of the stop, Ms. Foulkes agreed to allow Officer Szczepanski to search her purse. See id. The search revealed the existence of several illegal or controlled substances. Officer Szczepanski arrested Ms. Foulkes. See id. During the stop, Sergeant Farrell arrived as back up to Officer Szczepanski. See id.

During the stop, the officers also investigated the identity of the Plaintiff. (Doc. No. 45 at ¶ 5; Doc. No. 46 at ¶ 5; Doc No. 68 at ¶ 15) In response to questions by Sergeant Farrell, the Plaintiff told Sergeant Farrell that his name was Joe Rodriguez and that his identification was inside the clutch of his duffel bag. (Doc. No. 68 at ¶ 15). Sergeant Farrell asked for permission to search the duffel bag. See id. The Plaintiff gave him such permission. See id. Sergeant Farrell then removed the Plaintiff's driver's license and used his radio to communicate the Plaintiff's name and driver's license number See id. Sergeant Farrell then continued to look through the bag. See id. The bag contained a manilla folder containing hospital records, two or three bottles of prescription medication, and the zippered clutch. See id. Sergeant Farrell asked about the medication See id. The Plaintiff told Sergeant Farrell that the medication was his and that he had just gotten out of the hospital due to a motorcycle accident. See id.

A female voice then came over the radio stating "no wants or warrants." (Doc. No. 68 at ¶ 16). Sergeant Farrell then walked away from the Plaintiff. (Doc. No. 68 at ¶ 19). At that time, a "hit" was obtained from the St. Johns county Sheriff's Department (Doc. No. 46 at ¶ 5 specifically, it was learned through teletype communications that a warrant existed for a Victor Heredia who used an alias of Joe Rodriguez (Doc..No. 46 at ¶ 5). The individual was wanted on several charges, including drug related offenses (Doc. No. 56, Exhibit 2)

While it is not clear from the record or from the parties briefs what exact information was known by the officers at the time of the stop, the parties agree that the following information existed at such time about Victor Heredia and the Plaintiff:

	Victor Heredia	Plaintiff
Name:	Victor Manuel Heredia a/k/a Joe Rodriguez	Joe John Rodriguez
Sex:	Male	Male
Race:	White (Hispanic)	White
Birth date:	6/24/53; 7/2/53; 6/23/53 (multiple)	3/23/53
Birth Place:	New York	New York
Residence:	Apopka	St. Augustine
Social Security Numbers:	112-42-9808; 112-42-5808; 112-43-9808 (multiple)	115-42-5388
Height:	5'6"	5'11"
Weight:	139	180-190
Hair:	Brown	Brown
Eyes:	Green	Brown
Tatoos:	4 (various areas)	6 (various areas)
Other:	Scar on face	No scar on face

(Doc. No. 45 at ¶ 6; Doc No. 46 at ¶ 5; Doc No 56 Exhibits 2-3,11, 14-15; Doc No 68 at ¶ 4-7, 15, 18-20, 22; see also Doc. No. 43; Doc. No 50 Doc. No 76)[1]

After the name hit occurred, Sergeant Farrell returned to the Plaintiff to ask him some questions. (Doc. No. 46 at ¶ 6;Doc. No. 68 at ¶19-20). Sergeant Farrell asked the Plaintiff how tall he was (Doc No 68 at ¶ 19).

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[1] The teletype information about Victor Heredia was from more than five years before the arrest of the Plaintiff. (Doc. No. 45; Doc. No. 56, Exhibit 2).

The Plaintiff told him 5'll". See id. Sergeant Farrell said that he was 5'll" and that the Plaintiff was shorter. See Id. The Plaintiff responded that Sergeant Farrell was standing on a curb, while the Plaintiff was standing on the street. See id. Sergeant Farrell averred that he is six feet tall and that the Plaintiff appeared to be several inches shorter than him (Doc. No. 46 at ¶ 7) Officer Szczepanski remembered that the Plaintiff was between 5'7" and 5'9" (Doc. No. 49 at 13)

Sergeant Farrell then asked the Plaintiff if he had any tattoos. (Doc. No. 68 at ¶ 19). The Plaintiff said that he did. See id. Sergeant Farrell asked how many. See id. The Plaintiff said "six." Id. Sergeant Farrell asked, "But, do you have four?" Id. The Plaintiff responded, "[un order to have six you must have four Id. Sergeant Farrell then asked the
Plaintiff the locations of the tattoos. See id. The Plaintiff pointed to his left biceps with his right hand and then pointed to his right biceps with his left hand. See id. at 20.

Sergeant Farrell then, without warning, grabbed the Plaintiff's left arm from behind him, and twisted it up behind his shoulder blade (Doc No 68 at 20) The Plaintiff immediately fell to his knees in pain and yelled "what are you doing?" He repeatedly said to Sergeant Farrell "stop," "wait a minute," and that he was hurting him. Id. The Plaintiff asked Sergeant Farrell to be careful handcuffing him. (Doc. No.. 46 at ¶ 9) The Plaintiff was handcuffed. (Doc. No. 68 at ¶ 21). He continued to yell to Sergeant Farrell that he was hurting him. See id. at ¶ 22. He was grimacing in pain. See id.

Sergeant Farrell then said, "We've got you, Victor Herrara [sic]" and told him they had three warrants on him from St. John's County (Doc. No. 68 at ¶ 22). The

Plaintiff asked where St John's County was. See id. Sergeant Farrell said that it was in St. Augustine. See Id. The Plaintiff said that he had only been to St. Augustine once and that was recently. See Id. He also asked who "Victor Herrara" was. Id. The Plaintiff told Sergeant Farrell that he was making a big mistake. See id. The Plaintiff repeatedly told Sergeant Farrell that he was mistaken. See Id. at 23.

The Plaintiff was then taken to the police station. (Doc. No. 68 at 23-26). In the car, the Plaintiff groaned in pain, and asked for his bag so he could take his medication. See id. at ¶ 23, 25). Sergeant Farrell did not ask why the Plaintiff was groaning or ask why he needed to take his medication. See Id. at ¶ 25. After they arrived at the police station, the Plaintiff told Sergeant Farrell that he needed to take his pain medication. See id. at 26. Sergeant Farrell said the other officer was bringing his bag. See id. The Plaintiff continued to moan and grimace in pain at the police station. See Id.

At the police station, the officers did not ask the Plaintiff the location of any of his other tattoos (Doc. No. 68 at ¶ 28) Also, the officers did not ask to look at the tattoos.[2] See id.

Officer Szczepanski filled out an arresting affidavit with the following information: 5'7" 140 lbs; brown eyes; social security number 112-42-9808; place of birth – Bronx, New York; date of birth June 24 1953. (Doc. No. 61).

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[2] The locations of the Plaintiff's tattoos are different from the locations of Victor Heredia's tattoos. (Doc.. No. 60, Exhibit A at 50).

The Plaintiff originally fractured his elbow in a motorcycle accident (Doc. No. 70 at 5-6). The Plaintiff's orthopaedic surgeon stated under oath that x-rays of the Plaintiff taken prior to his September 8, 1995 arrest and after his arrest show a widening of the Plaintiff's elbow fracture. The surgeon attributed such widening to trauma caused by the handcuffing. (Doc. No. 67 at ¶5; Doc. No. 70 at 11, 18). X-rays in November continued to show such problems (Doc.. No. 70 at 19). The Plaintiff had to have surgery due to complications in his left elbow joint in 1995, 1996, and 1997 (Doc.. No. 67 at ¶ 2)

Legal Analysis

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ.. P. 56(c); accord, Anderson v. Liberty Lobby. Inc., 477 U.S. 242 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." Id. at 248. The moving party bears the burden of proving that no genuine issue of material fact exists. Celotex v. Catrett, 477 U.S. 317, 323 (1986). In determining whether the moving party has satisfied the burden, the Court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. Anderson, 477 U.S at 255. The Court may not weigh conflicting evidence or weigh the credibility of the parties. See, Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (11th Cir. 1993)(citation omitted). If a

reasonable fact finder could draw more than one inference from the facts and that inference creates an issue of material fact, then the Court must not grant summary judgment. Id. (citation omitted)

The Claim for Unlawful Arrest Against the Individual Defendants

The Individual Defendants first move for summary judgment on the Plaintiff's unlawful arrest claim. The Individual Defendants assert that they are entitled to qualified immunity on this claim.

Government officials sued in their individual capacities under section 1983 are able to assert qualified immunity as a defense to suit See, Wood v. Strickland, 420 U.S 308, 321-22 (1975); Harlow v. Fitzgerald, 457 U.S. 800, 814-20 (1982). Qualified immunity "protects government officials performing discretionary functions from civil liability if their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known. Dolihite v. Maughon By and Through Videon, 74 F.3d 1027, 1040 (11th Cir. 1996), cert. denied, 117 5. Ct 185 (1996) (quoting Harlow, 457 U.S. at 818); see also, Jones v. City of Dothan. Alabama, 121 F.3d 1456, 1459 (11th Cir 1997); Cofield v. Randolph County Comm'n, 90 F.3d 468, 470 (11th Cir 1996). A determination that the right is clearly established requires that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S 635 639-40; see also Cofield, 90 F.3d at 470; Rodgers v. Horsley, 39 F.3d 308, 310 (11th Cir 1994) "This is not to say an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it

is to say that in the light of pre-existing law the unlawfulness must be apparent." Dolihite, 74 F.3d at 1041 (quoting Anderson, 483 U.S at 640 (citations omitted).

In qualified immunity cases, the Eleventh Circuit applies an objective reasonableness test asking "'whether a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred Dolihite, 74 F.3d at 1041 quoting Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1503 (11th Cir 1990) This standard protects government officials from individual liability except the plainly incompetent or those who knowingly violate the law. See, Swint v. City of Wadley, Ala., 51 F.3d 988, 995 (11th Cir. 1995); Nicholson v. Georgia DeD't of Human Resources, 918 F.2d 145, 146 (11th Cir. 1991) (citing Mallev v. Briggs, 475 U.S. 341 (1986); Stewart, 908 F.2d at 1503).[3]

In a case involving an alleged unlawful arrest, a police officer is entitled to qualified immunity if probable cause or arguable probable cause exists for the arrest. See, Jones v. Cannon, 174 F.3d 1271, 1283 (11th Cir. 1999); see also, Wyatt v. Cole, 504 U.S. 158, 170 (1992) Arguable probable cause exists "if a reasonable police officer, knowing what [the defendants] knew,

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[3] "In qualified immunity cases, courts are given the often herculean task of weighing and comparing two competing standards that almost bump into each other and sometimes appear to overlap. Using the summary judgment standard, courts are

could have believed there was probable cause for the warrantless arrest." Jones, 174 F.3d at 1283.

In this case, an issue of fact exists as to whether or not Sergeant Farrell is protected by qualified immunity. A reasonable jury could find that Sergeant Farrell was aware of the five inch difference in height between the Plaintiff and Victor Heredia. (Doc. No. 45 at ¶ 5-6; Doc No. 46 at 5; Doc. No 56 Exhibits 2-3, 11, 14-15; Doc. No 68 at ¶ 4-7, 15, 18-20, 22). A reasonable jury could find that Sergeant Farrell aware that Victor Heredia had a scar on

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required to view the facts in a light most favorable to the plaintiff and to draw every inference in favor of the plaintiff. See, Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 255 (1986). At the same time, using the qualified immunity standard, courts must consider whether a reasonable government official could have viewed his or her actions as lawful given the information possessed at the time of such actions. Dolihite v. Maughon By and Through Videon, 74 F.3d 1027, 1040-41 (11th Cir. 1996). Thus, when these standards are combined, a court is required to determine whether a reasonable government official could have viewed the action he or she supposedly took, when the purported facts surrounding such action are viewed in a light most favorable to the plaintiff, given the information the official possessed at the time of such action, when the purported facts surrounding such information is viewed in a light most favorable to the plaintiff. For instance, a court may be given limited facts such as that a police officer kicked an individual, who appeared large and menacing, during an arrest where the officer may

his face and that the Plaintiff did not have such a scar. See id. A reasonable jury could find that Sergeant Farrell was aware that the Plaintiff appeared much heavier than the description he had of Victor Heredia. See id. A reasonable jury could find that Sergeant Farrell was aware that the Plaintiff had different color eyes than Victor Heredia. See id. When these facts are viewed together, a reasonable officer in Sergeant Farrell's position may not have believed that he or she had probable cause or

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have, but probably did not, know facts which would have shed considerable doubt about whether the officer had probable cause to arrest the individual and where the individual said that the kick caused him extreme and lasting pain. The court must then determine whether every reasonable officer in the police officer's situation would inevitably conclude that the force that the police officer used was unlawful. See, Nolin v. Isbell, 207 F.3d 1253, 1255 (11th Cir. 2000) (citation omitted). In order to make this determination, the court must weigh how hard the kick may have been, whether the force used was de minimis, whether the officer had arguable probable to arrest the individual, the threat to his or her safety the officer may have felt, and the injury which the individual may have experienced when the limited facts are viewed in a light most favorable to the individual and when every inference is drawn in favor of the individual. It is no wonder that confusion has developed in this area as to whether a government official is protected by qualified immunity at the summary judgment stage of a proceeding. See, e.g. Nolin, 207 F.3d at 1255-58 (discussing and

arguable probable cause to arrest the Plaintiff despite the similarities between the Plaintiff and Victor Heredia. See, Johnson v. City of New York, 940 F.Supp. 631, 636 (S.D.N.Y. 1996) (finding that issue of fact existed where five inch difference existed between height of individual arrested and the person who was wanted); see generally, Cannon v. Macon County, 1 F.3d 1558, 1564 (11th Cir. 1993) finding no qualified immunity where factual issue existed as to whether officer took any steps to determine whether person arrested was the wanted fugitive that officer thought her to be); Tillman v. Colev, 886 E.2d 317, (11th Cir. 1989) (affirming denial of qualified immunity on summary judgment where sheriff was only aware that name, height, weight, and complexion of individual arrested for identification purposes generally matched those of a suspect); but see , Brown v. Patterson, 823 F.2d 167, 173-74 (7th Cir. 1987) (finding qualified immunity existed

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distinguishing Eleventh Circuit cases involving the use of excessive force); see also, Tillman v. Coley, 886 F.2d 317, 320 (11th Cir. 1989) (affirming denial of qualified immunity on summary judgment where sheriff was only aware that name, height, weight, and complexion of individual arrested for identification purposes generally matched those of a suspect); Patton v. Przvbvlski, 822 F.2d 697, 699 (7th Cir. 1987) (police officer did not act unreasonably in arresting driver stopped for alleged traffic violation whose race, name, and year of birth matched that of person sought in outstanding warrant even though arrestee's driver's license bore different address and birth date from those of person sought).

where officer arrested individual based on having the same or similar name, race, sex, birth date and residence as person who was not wanted); Patton v. Przybylski, 822 F.2d 697, 699 (7th Cir. 1987) (police officer did not act unreasonably in arresting driver stopped for alleged traffic violation whose race, name, and year of birth matched that of person sought in outstanding warrant even though arrestee's driver's license bore different address and birth date form those of person sought).

An issue of fact also exists as to whether Officer Szczepanski is protected by qualified immunity for arresting the Plaintiff. According to Sergeant Farrell, Officer Szczepanski made the decision to arrest the Plaintiff after consulting with Sergeant Farrell. (Doc. No. 46 at ¶ 4). A reasonable jury could find that Officer Szczepanski was aware of the differences between Victor Heredia and the Plaintiff based on such consultation with Sergeant Farrell. Officer Szczepanski may also have breached her duty to take steps to identify whether the Plaintiff was Victor Heredia when she averred that he was five feet seven inches when she had access to his driver's license which stated that he was five feet eleven inches tall. (Doc. No. 61); see, Canon, 1 F.3d 1564 (finding that officer's failure to take any steps to identify an individual as the wanted fugitive for whom she was mistakenly arrested raised a question of fact as to the officer's deliberate indifference toward the individual's due process rights).

Accordingly, summary judgment is not warranted on the Plaintiff's Section 1983 unlawful arrest claim with respect to Sergeant Farrell and Officer Szczepanski.

The Unlawful Arrest and False Arrest Claims Against the City

The City of Winter Park ("City") moves for summary judgment on the false arrest claim and the unlawful arrest claim. The City first argues that summary judgment is warranted on these two claims because the officers had probable cause to arrest the Plaintiff. The City also argues that summary judgment is warranted on the unlawful arrest claim because the officers had arguable probable cause. Summary judgment is not warranted on these claims in favor of the City for these reasons because, as discussed above, an issue of fact exists as to whether the officers had probable cause or arguable probable cause to arrest the Plaintiff. See generally, Gold v. City of Miami, 151 F.3d 1346, 1349 (11th Cir. 1998); (discussing elements for unlawful arrest claim); Rivers v. Dillards Dept. Store, Inc., 698 So.2d 1328, 1331 (Fla. Dist. Ct. App. 1997) (discussing elements for false arrest claim).

The City next asserts that summary judgment is warranted on the unlawful arrest claim because the alleged unlawful arrests were not based on a municipal policy or custom. In order for the City to be liable on the unlawful arrest claim, the alleged unlawful arrest had to have been pursuant to a custom or policy of the City. See, Mandel v. Doe, 888 F.3d 783, 791 (11th Cir. 1989).

The Plaintiff has not directed the Court to evidence showing that the arrests were made based on an unconstitutional policy of the City. The Plaintiff argues that the City is liable because Chief of Police Douglass Ball ratified the conduct of the police officers through statements that he made. Chief of Police Ball, however, was not the chief of police at the time of the incident. (Doc. No. 45 at ¶ 2; Doc. No. 58 at ¶ 2). Accordingly, he could not have ratified the officers' actions. Ratification can only occur at or before the time of the unlawful action in order for such ratification to create municipal

liability. City of Louis v. Praprotniku, 485 U.S. 112, 130 (1988); Christie v. Iopa, 176 F.3d 1231, 1239 (9th Cir.1999) ("ratification requires, among other things, knowledge of the alleged constitutional violation"); Sango v. City of New York, 1989 WL 86995, *20 (E.D.N.Y. July 25, 1989); citing Tompkins v. Frost , 655 F.Supp. 468, 472 (E.D. Mich. 1987) ("conduct occurring after the incident at issue lacks she requisite 'affirmative link' to plaintiff's injuries -- that is, plaintiffs cannot establish causation").

The Plaintiff also argues that the City ratified the actions of the officers by finding no violation in a subsequent internal affairs investigation. A city's failure to discipline or take action against an employee is not evidence of a policy or custom which creates municipal liability in a Section 1983 case. See, Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1998) ; Neill v. City of Concord, 1995 WL 234912, *7 (9th Cir. April 20, 1995) ; see also, Gold, 151 F.3d at 1353 (finding summary judgment warranted in favor of defendant city where there was no showing that the city's policy of investigating false arrest claims caused the arrest in the case before the court). Accordingly, summary judgment is granted in favor of the City on the unlawful arrest claim.

The Excessive Force Claim Against Sergeant Farrell:

Sergeant Farrell next asserts that he is protected by qualified immunity from the Plaintiff's excessive force claim. "It is clearly established that the use of excessive force in carrying out an arrest constitutes a violation of the Fourth Amendment." Thornton v. City of Macon, 132 F.3d 1395, 1400 (11th Cir. 1998) (citing Graham v. Connor, 490 U.S. 386, 394 (1989)). In determining whether the force used is reasonable, courts must

examine the facts and circumstances of each case, "'including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" Id. (quoting Graham, 490 U.S. at 396). A police officer will be protected by qualified immunity "'unless application of the standard would inevitably lead every reasonable officer in [the position of the defendant officer] to conclude the force was unlawful.'" Nolin v. Isbell, 207 F.3d 1253, 1255 (11th Cir. 2000) (quoting Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559 (11th Cir. 1993), modified 14 F.3d 583 (11th Cir. 1994)).

A police officer will also be protected by qualified immunity where a police officer in arresting an individual for whom there was probable cause or a warrant to arrest such individual used force that was de minimis. See Nolin, 207 F.3d at 1255-58. In Nolin, the Court found that a police officer was protected by qualified immunity where the appellee claimed the following facts existed:

> Appellee claims Appellant grabbed him from behind by the shoulder and wrist, threw him against a van three or four feet away, kneed him in the back and pushed his head into the side of a van, searched his groin area in an uncomfortable manner, and handcuffed him. Appellee maintains he suffered bruising to his forehead, chest, and wrists, although he admits the bruises disappeared quickly and he did not seek medical treatment.

Id. at 1254. The court distinguished the case from previous Eleventh Circuit cases in which force was used

against an individual where no probable cause or warrant existed for arresting the individual. See id. at 1258. Probable cause existed in the case before the Eleventh Circuit. See id. at 1255, 1258. The court found that qualified immunity existed to protect the police officer because the force used and injuries resulting from such force were minimal. See id. at 1258.

In this case, when the facts are viewed in a light most favorable to the Plaintiff, it appears that a reasonable jury could find that Sergeant Farrell used excessive force when arresting the Plaintiff and that such force was not de minimis. As noted above, an issue of fact exists as to whether Sergeant Farrell had probable cause or arguable probable cause to arrest the Plaintiff.[4] The Plaintiff had been allowed to walk around freely up until the time he was arrested. (Doc. No. 68 at ¶19). There is no evidence that the Plaintiff posed any threat to the police officers. (Cf. Doc. No. 45; Doc. No. 46; Doc. No. 68). The Plaintiff informed Sergeant Farrell that he had been in a motorcycle accident and asked him to be careful when he handcuffed him. (Doc. No. 46 at ¶ 9; Doc. No. 68 at ¶ 15). The Plaintiff avers that after he was handcuffed, and as a result of being handcuffed, he screamed in pain, repeatedly grimaced in pain, repeatedly informed Sergeant Farrell that he was in pain, and asked Sergeant Farrell for his pain medication. (Doc. No. 68 at ¶ 20-26). The Plaintiff's orthopaedic surgeon stated under oath that he believed that the Plaintiff's elbow injury was worsened by the handcuffing of the Plaintiff. (Doc. No. 67; Doc. No. 70 at 11, 18-26).

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[4] The possible lack of probable cause here distinguishes this case from Nolin. See Nolin, 207 F.3d at 1255, 1258.

The surgeon also indicated that the worsened injury required numerous surgeries over a period of almost two years. (Doc. No. 67; Doc. No. 70 at 18-49). This evidence is sufficient to create an issue of fact as to whether Sergeant Farrell used excessive force when he handcuffed the Plaintiff and purportedly left the handcuffs on in spite of the Plaintiff's protestations. See, Thornton v. City of Macon, 132 F.3d 1395, 1398-1400 (11th Cir. 1998); Howard v. Dickerson, 34 F. 3d 978, 979-81 (10th Cir.1994) ; Walton v. City of Southfield, 995 F.2d 1331, 1342 (6th Cir. 1993); Palmer v. Sanderson, 9 F.3d 1433, 1436 (9th Cir. 1993); see also, Heitschmidt v. City of Houston, 161 F.3d 834, 839 (5th Cir. 1998); Guite v. Wright, 147 F.3d 747, 750 (8th Cir. 1998).

The Excessive Force Claim Against the City:

The City asserts that summary judgment is warranted in its favor on the excessive force claim. The Winter Park Police Department had the following policy regarding handcuffing at the time the Plaintiff was arrested:

> Before transporting, all prisoners will be handcuffed behind their backs with the seat belt latched unless there are specific, articulable reasons for other actions. There may be some instances where it may be appropriate to handcuff a prisoner in front of his body or not to handcuff at all. However, these instances are rare and such action should be justified by each officer. i.e. very young, old, or disabled persons.

(Doc. No. 56, Exhibit 16 at 106-12) .[5] The Plaintiff then

directs the Court to Chief of Police Douglas Ball's deposition. Once again, Chief of Police Ball's interpretation of the handcuffing policy cannot be interpreted as the City's custom or policy at the time of the arrest because Chief of Police Ball was not the chief of police at the time of the arrest.' Summary judgment is warranted on behalf of the City on this claim because the Plaintiff has failed to show that the Winter Park Police Department's handcuffing policy and the way it is interpreted is unconstitutional.

The Plaintiff's Motion for Summary Judgment:

The Plaintiff next moves for partial summary judgment with respect to his claims against the City. The

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[3]. The Plaintiff also states that the Winter Park Police Department had the following policy:

> Although an officer has discretion not to handcuff a suspect behind his back, there is no requirement to do so, the written policy discourages him to do so, and an officer has no fear of an internal investigation on his decision, as his decision is unfettered except where done to deliberately inflict pain or punishment.

(Doc. No. 76 at 30). It appears that this is the Plaintiff's interpretation of the Winter Park handcuffing policy and the way in which such policy is construed. The Court has not found such policy in the record. Even if a written policy such as the one described existed, it does not appear that it would be unconstitutional on its face because it

Plaintiff first moves for summary judgment on the issue of whether he complied with the presuit requirement for bringing this lawsuit. The City concedes that the Plaintiff complied with this requirement. Accordingly, summary judgment is granted in favor of the Plaintiff on this issue.

The Plaintiff next seeks summary judgment on the issue of whether or not Chief of Police Ball was a final policy maker and on the issue of whether or not the City ratified the conduct of the police officers. Because summary judgment is being granted in favor of the City on the unlawful arrest and excessive force claims, these issues are moot. Accordingly, summary judgment is denied on these issues.

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would give officers on the scene the discretion to determine, based on the circumstances to which they are confronted, whether an individual should be handcuffed in the back.

[6]. Even if Chief of Police Ball's statements were considered, such statements do not create an unconstitutional policy. In essence, Chief of Police Ball stated that an officer has discretion at the time of an arrest to determine whether an individual should be handcuffed in the back. (Doc. No. 63 at 35-36). Providing officers with such discretion is not unconstitutional.

Conclusion

Based on the foregoing, the Court rules as follows:

1) Defendant City of Winter Park's Motion for Summary Judgment (Doc. No. 50) is **GRANTED IN PART AND DENIED IN PART** in accordance with this Order. Summary judgment is **GRANTED** in favor of the City of Winter Park on the Plaintiff's unlawful arrest and excessive force claims.

2) Motion for Summary Judgment of Defendants, Wayne M. Farrell and Lois (Lorri) Szczepanski (Doc. No. 43) is **DENIED.**

3) Plaintiff's Motion for Partial Summary Judgment Against the Defendant, City of Winter Park (Doc. No. 60) is **GRANTED IN PART AND DENIED AS MOOT IN PART** in accordance with this Order.

DONE AND ORDERED at Orlando, Florida, this 7th day of June, 2000.

"s/_____"
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE